Supreme Court, U.S.
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87-1434
No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

TERRI LYNN SCRAPE,

Petitioner,

vs.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

KIM H. PEARMAN
A Law Corporation
Suite 307
7080 Hollywood Boulevard
Hollywood, California 90028
(213) 466-4525
Attorney for Petitioner

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Whether a warrantless search for suspects at a murder scene violates a criminal defendant's Fourth Amendment rights where the search includes photographing, video taping and dusting for fingerprints in the house in which the homicide occurred.

2. Whether Petitioner is denied due process of law when the doctrine of inevitable discovery is raised by the State for the first time on Appeal, when Petitioner has no opportunity to present evidence regarding that theory to support the admissibility of evidence obtained in an unconstitutional search.

3. Whether California's rule of per se inadmissibility of testimony by a person previously hypnotized

violates due process of law when applied against a witness in a criminal action whose testimony is critical to the defense of a defendant.

4. Whether Petitioner's conviction is so totally devoid of evidentiary support as to render it a denial of due process.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The unpublished opinion of the Court of Appeal of California filed August 25, 1987 is set forth in full in Appendix "A" to the Petition for Writ of Certiorari.

The Order of the Supreme Court of California filed December 2, 1987 denying Petitioner's Petition for Review is set forth in full in Appendix "B" to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner's Petition for Review to the Supreme Court of California was denied on December 2, 1987. An extension up to and including March 1, 1988 within which a Petition for Writ of Certiorari to the United

States Supreme Court must be filed was entered on January 21, 1988. Jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. 1257 on the grounds that a right or privilege of the Defendant is claimed under the Constitution of the United States which right has been denied by the State.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and

particularly describing the place to be searched, and the person or things to be seized.

Constitution of the United States
Amendment 14

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On Sunday, May 13, 1984 at approximately 3:40 a.m., Terri Lynn Scrape found her husband lying in a pool of blood in the livingroom of their house. Mrs. Scrape went to a neighbor's home for help. When the police arrived, four officers searched the premises for suspects, finding no one other than the victim's dead body.

Mrs. Scrape was taken to the police station for questioning. There she told the officers that she and her husband had spent a romantic evening at home, drinking, dancing and making love in the livingroom where they both had fallen asleep. At 1:00 a.m., Terri Scrape got up, took a shower in her bathroom and

fell asleep on the bed in her bedroom waiting for her husband. She woke up, realized that her husband was not there and went looking for him. She found him covered in blood in the livingroom and she ran out to her neighbor. Mrs. Scrape was not a suspect at that point.

While Defendant was at the police station and after the officers who first arrived at the house had searched for suspects, police investigators went to the Scrape residence. The investigation crew took photographs, video taped portions of the house and dusted for fingerprints. The investigators remained at the house for some seven to eight hours.

The next day, Mrs. Scrape met with the police at the Scrape resi-

dence for the purpose of seeing what had been missing and moved. While at the house, Mr. and Mrs. Parkinson informed the police that they had heard a violent argument at the Scrape residence between 3:00 a.m. and 3:40 a.m. on May 13, 1984. The argument involved two male voices and one female voice.

At this point, Mrs. Scrape became a suspect. A search warrant was obtained to examine the house on Wednesday, May 16, 1984. The search revealed a paring knife consistent with the stab wounds on Mr. Scrape's chest and back which, when tested, revealed traces of Type A blood, the same type as the victim's. Testing on a fireplace poker discovered during the officers' search

of the premises when first called to the scene, also revealed traces of Type A blood.

Also during the search on Wednesday, a spot of Type A blood was found on a hamper, and a dimmer switch in the livingroom tested weak positive for the presence of blood.

Blood spatter analyses of photographs of the crime scene indicated that the scene had been altered after the killing.

Mrs. Scrape was charged with murder through the use of a deadly and dangerous weapon, a knife or a fireplace poker.

The Prosecutor's theory at Trial was that the murder occurred during a lover's triangle fight between the Petitioner, the Dece-

dent and a man by the name of Anthony Phillips. Petitioner and her husband are both white; Phillips is black. According to the Prosecutor, Petitioner stabbed Mr. Scrape with a knife while Phillips hit him with the poker. The scene was then altered to make it look like the couple had spent a romantic evening together; Petitioner took a shower and Phillips left before Petitioner ran to her neighbor's house for help.

Prior to Trial, Petitioner's counsel moved to suppress all evidence obtained by the investigators during their warrantless search of the premises on May 13, 1984. The Trial Court denied the Motion on the ground that the initial search at the house was to secure a crime scene and

was in the early investigative stages of the matter.

At Trial, the Prosecution called Mr. and Mrs. Parkinson. A few months after they first informed the police that they had heard an argument, they informed the police that one of the male voices had an ethnic accent, either black or hispanic. At some point, both had heard that one of the suspects was a black male. Thereafter, at Trial, both testified that one of the voices they heard was that of a black man. They further testified that the black voice and the female voice were directed against the white male voice in the argument. Mr. Parkinson also testified that he remembered hearing at the time every word of the argument but he could not

later recollect them.

Petitioner was convicted by the jury of second degree murder through the use of a deadly and dangerous weapon. In moving for a new trial, Petitioner requested that the Trial Court order hypnosis of the Parkinsons to aid in their recalling the words they heard from the Scrape residence on the night of the murder. The Trial Court denied this request; judgment was entered and Petitioner was sentenced to a term of sixteen years to life.

Petitioner appealed to the Court of Appeal of the State of California which affirmed the judgment. Petitioner thereafter petitioned for review to the California Supreme Court. The Petition was

denied.

The points raised here on appeal were raised in the Trial Court, the State Appellate Court and the State Supreme Court, where applicable.

SUMMARY OF ARGUMENT

The warrantless search for suspects at Petitioner's house was overbroad and violated the Petitioner's Fourth and Fourteenth Amendment rights and the Trial Court's admission of evidence obtained during the search was erroneous.

Petitioner was denied due process of law in that she was not given notice or the opportunity to present evidence regarding whether or not the evidence obtained in the unconstitutional search of her home was admis-

sible under the doctrine of inevitable discovery.

The Trial Court's Order denying Petitioner the right to conduct hypnosis of witnesses constitutes a denial of due process of law in that it denied Petitioner the right to present evidence on her own behalf.

ARGUMENT

I.

THE WARRANTLESS SEARCH OF THE MURDER SCENE WAS UNCONSTITUTIONAL

After Petitioner's residence had been searched for suspects and while Petitioner was at police headquarters, investigators from the police department, without warrant, descended upon Petitioner's home. Over a seven to eight hour period, at least three

detectives, two photographers, two print men and three video tapers combed the house. They took photographs, video taped the house and dusted for and obtained fingerprints, all of which, along with other observations made by some of the detectives, were introduced at Trial.

The search by the investigators was unconstitutional. At the scene of a murder, police may only make a prompt, warrantless search to see if there are other victims or if the killer is on the premises. Thompson v. Louisiana, 469 US 17, 83 L.Ed.2d 246 (1984); Mincey v. Arizona, 437 US 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In both Thompson and Mincey, warrantless searches were conducted

and evidence obtained, after the homicide scenes had been searched for suspects. Not being incident to a search for suspects, these searches were held to be unconstitutional.

The same conclusion must be reached here. The search here by a team of homicide investigators was not for the purpose of finding out whether the suspect was on the premises. Instead, police conducted a general exploratory search for evidence after it was determined that no suspects were present. Not having obtained a warrant, the search was unconstitutional.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT SHE WAS NEVER GIVEN NOTICE OR THE OPPORTUNITY TO PRESENT EVIDENCE AS TO WHETHER THE EVIDENCE OBTAINED IN THE UNCONSTITUTIONAL SEARCH OF PETITIONER'S HOME WAS ADMISSIBLE ON THE THEORY OF INEVITABLE DISCOVERY.

Evidence obtained in an illegal search may nonetheless be admissible if the prosecution proves by a preponderance of evidence that the information inevitably would have been discovered by lawful means. Nix v. Williams, 467 US 431, 104 S.Ct. 2501, 81 L.Ed.2d, 377 (1984).

In the instant case, Petitioner moved to suppress all information obtained in the warrantless search of her home. The Trial Court did not apply the inevitable discovery doctrine nor was the doctrine raised.

Instead, the Trial Court found that the search was proper because it was to secure a crime scene and was in the early stages of investigation. The Trial Court refused to suppress the evidence.

The inevitable discovery doctrine was first raised by the State on appeal. In its decision, the California Court of Appeal concluded that this case was distinguishable from Thompson and Mincey in that the evidence was consequently admissible, because it would inevitably have been discovered.

Not having notice in the Trial Court that the inevitable discovery doctrine was in issue, Petitioner was denied a full, fair and impartial hearing on the matter.

The evidence obtained in the illegal search was critical to the State's case. Photographs of the scene were used to show that the scene had been altered after the killing. The observations and photographs of water droplets in the shower were used to show that Petitioner had taken a shower not at 1:00 a.m., as she contended, but much later, just after the murder.

The State was required to prove that they would inevitably have discovered the information obtained in the illegal search. Because no hearing was ever held, the State was never required to show, for example, that they would have discovered droplets in the shower in a lawful manner.

The failure to provide Petitioner

a hearing on the question of inevitable discovery was a fundamental denial of Petitioner's due process rights. Singleton v. Wulff, 428 US 106, 120-121, 96 S.Ct. 28, 68 (1976); Armstrong v. Manzo, 380 US 345, 552, 85 S.Ct. 1187 (1965).

III.

THE REFUSAL TO ALLOW PETITIONER TO HYPNOTIZE WITNESSES WAS A DENIAL OF DUE PROCESS.

The testimony of Mr. and Mrs. Parkinson was the only evidence to place Petitioner, her husband and Phillips at the Scrape residence at the time of the killing. Their testimony was also the only evidence to show a violent argument among the three at that time.

Neither individual could recall at Trial any of the words they had overheard. After Trial, Petitioner requested that the Parkinsons be ordered to submit to hypnosis to refresh their memory. The request was denied.

The California Court of Appeal upheld the denial of this request based on the case of People v. Shirley, 31 Cal.3d 18, 723 P.2d 1354 (1982). Under Shirley, California adopted a per se rule that a person may not testify as to any events that were the subject of questioning during hypnosis.

In light of the recent case of Rock v. Arkansas, ___US___, 107 S.Ct. 2705, 97 L.Ed.2d 37 (1987), Cali-

fornia's per se rule precluding a witness' hypnotically refreshed testimony is improper.

In Rock, the Court rejected Arkansas' rule excluding all hypnotically enhanced testimony when it applied to a criminal defendant's testimony. The Court held that the State had not shown that hypnotically enhanced testimony is always so untrustworthy and so immune from being evaluated for credibility that a defendant cannot testify at Trial.

The Court in Rock specifically left open the question as to whether a per se exclusion rule could apply to hypnotized witnesses other than the defendant. Petitioner submits that the answer is no.

A criminal defendant's right to

present a defense includes not only the Constitutional right to testify in his own behalf but also the Constitutional right to present evidence in his behalf. Washington v. State of Texas, 388 US 14, 18-19, 87 S.Ct. 1920, 1923 (1967).

California's per se rule excluding the testimony of a hypnotized witness exhibits the same problems that were addressed by the Court in Rock. It impinges on a defendant's Constitutional rights by precluding all posthypnotic testimony sought to be introduced on a defendant's behalf as unreliable without showing that posthypnotic testimony is always so untrustworthy and so incapable of having its credibility judged that it must be excluded. Therefore, as

in Rock, California's per se rule is also unconstitutional. The failure of Petitioner to be allowed to obtain all relevant evidence is a denial of due process.

IV.

PETITIONER'S CONVICTION IS SO DEVOID OF EVIDENTIARY SUPPORT THAT IT IS A DENIAL OF DUE PROCESS.

A conviction that finds no support in the record is void as a denial of due process. Thompson v. City of Louisville, 362 US 199, 204, 80 S.Ct. 624, 628, 4 L.Ed.2d 654 (1960). Such is the case here.

The case against Petitioner was so fraught with uncertainty and unsupported by the evidence that the conviction denied her due process. At most, the evidence showed that

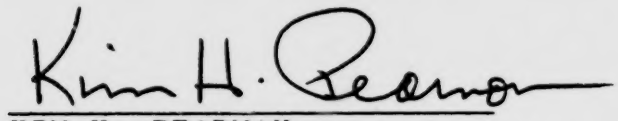
Petitioner was present at the killing and perhaps had a motive and the opportunity to kill her husband. However, there was a complete lack of evidence showing that Petitioner murdered her husband either with a knife or a fireplace poker or by any other means.

Similarly, the evidence does not show that Petitioner aided or abetted anyone else in the killing of her husband.

CONCLUSION

The judgment should be reversed.

Respectfully Submitted,



KIM H. PEARMAN

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TERRI LYNN SCRAPE, Defendant and Appellant.	No. B015302 (Super.Ct.No. A 807562) COURT OF APPEAL - SECOND DIST. F I L E D AUG 25 1987 ROBERT N. WILSON Clerk .... Deputy Clerk

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APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Kim H. Pearman, for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Gary R. Hahn, Supervising

Deputy Attorney General, Robert R. Anderson, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant Terri Lynn Scrape appeals from the judgment of conviction following a jury trial of second degree murder (Pen. Code, § 187) of her husband, Andy Scrape, through use of a deadly and dangerous weapon (Pen. Code. § 12022, subd. (b), to wit, a knife and/or fireplace poker. Defendant was acquitted of first degree murder. Defendant raises a host of contentions on appeal,[1/] all of which we find lack merit. Affirmed.

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1. Defendant contends: (1) the

evidence is insufficient to support the judgment; (2) the evidence is insufficient to support the Penal Code section 12022, subdivision (b) finding; (3) the section 1538.5 motion to suppress evidence obtained at the time of the initial investigation and prior to the issuance of the search warrant was improperly denied; (4) the court improperly admitted evidence obtained as a result of investigative work conducted during the trial; (5) the court improperly admitted evidence that defendant was having an affair with Anthony Phillips; (6) the court improperly admitted evidence concerning payment of money by defendant to Phillips for cocaine; (7) the court improperly admitted evidence concerning the incidence of nighttime burglaries of occupied dwellings in the area of victim's and defendant's home; (8) the court improperly admitted evidence of a loud argument at defendant's and victim's home shortly before the murder, including the fact that one of the voices belonged to a Black male (Anthony Phillips is Black); (9) the trial court improperly failed to give a voluntary manslaughter instruction given evidence of defendant's alcohol consumption; and (1) the trial court should have granted defendant's post-conviction request that the neighbors who testified to the argument be hypnotized in an effort to aid their recollection.

FACTS

At approximately 3:40 a.m. on Sunday, May 13, 1984, defendant ran to her neighbor's home for help in calling the police because she had seen her husband lying in a pool of blood in their living room. When police and paramedics arrived, defendant stated her husband was hurt and people could still be inside. The officers searched the premises for suspects, finding only victim's dead body. The dining room sliding glass door to the back yard was partially open, and a fireplace poker, gym bag, tennis racket, towel, and a pair of pants were found on the back lawn. The poker, which

had blood on it, was consistent with the multiple blows to Andy Scrape's head. The front gate, usually locked, was open.

Defendant, who was dressed in a robe and whose hair was wet as if it had just been washed, was taken to the station for questioning. There, she was informed that her husband was dead. She related that after cooking dinner together, she and her husband had spent a romantic evening watching television, dancing, drinking champagne, making love and sleeping in front of the fireplace in the living room. At about 1 a.m., she got up, took a shower, put on a robe, and fell asleep on the bed, while waiting for her husband. She woke, realized the lights and stereo

were still on and that her husband had not come to bed, and went to look for him. As she walked across the living room she thought he was asleep on the floor; when she turned on the dining room light, she saw he was covered with blood. Realizing he was hurt, she ran out of the house. While she claimed she did not go over to him or touch him, she later told people that "he was so cold". An officer examined defendant's arms and legs and found no signs of injuries.

While defendant was questioned at the station, police investigators photographed and videotaped parts of the house and dusted for fingerprints. The bed did not appear to have been slept in, and the shower

was wet. There were signs of a struggle in the living room.

The next morning, Monday, defendant met police at the house, as prearranged, for the purposes of walking through to see what was missing and moved, and to conduct further fingerprint testing of the premises. They looked unsuccessfully for Andy Scrape's missing necklace and wallet. The house had not been ransacked.

While at the house on Monday, the investigating officer was approached by a neighbor, Mrs. Parkinson, who indicated she had heard a loud argument at the house at about 3:00 a.m. Sunday morning. Monday evening, Mr. and Mrs. Parkinson were interviewed at the station and

related hearing a violent argument involving two male and one female voices, and the sounds of heavy furniture being moved or thrown about. Mr. Parkinson also heard a car leaving, and then a female voice stating: "He's been killed." This occurred between about 3:00 a.m. and 3:40 a.m.

At this point, defendant became a suspect in the killing. On the following day, Wednesday, police criminalists examined the house pursuant to a search warrant. A paring knife, with a three-inch blade consistent with the stab wounds on Andy Scrape's chest and back, was found in the dishwasher. The blade appeared to have butter or margarine on it. In comparison, the other

utensils in the dishwasher were clean. Chemical testing of the blood on the knife and on the poker revealed traces of human, type A blood, the same type as Andy Scrape's.

Also, in the master bedroom bathroom, a spot of blood was found on the hamper. The dimmer switch in the living room tested weak positive for the presence of blood. Testing of the entry way floor revealed partial bloody footprints that appeared to possibly go toward the hallway leading to the bedrooms.

Blood spatter analysis of photographs of the crime scene indicated the scene had been altered after the killing. Apparently the ice bucket, ice, and pillows were

not there at the time of the blood-letting. Also, blood found above the fireplace indicated, consistent with blood trails on Andy Scrape's body, that he had been standing when at least some of the blood letting had occurred. Blood swipes on the body indicated the pants and shoes had been removed.

The autopsy revealed about seventeen blows to the head with an object consistent with the poker, which fractured the skull in several places and caused hemorrhaging and bruising of the brain. One blow with an object consistent with the poker, broke the thyroid cartilage of the neck. Any of these blows could have been fatal. Four stab wounds with an object consistent

with the paring knife were found on the chest, along with superficial wounds on the arms and face. One of the wounds to the heart was fatal, as was a stab wound to the back. All wounds were inflicted while Andy Scrape was alive.

All prints were identified with the exception of a print from the sliding glass door which lacked enough points to make a comparison.

A few months after the killing, the Parkinsons informed the detective that one of the male voices had an ethnic accent, either Black or Hispanic. By the time of trial, both testified that the accent was Black. At some point, both had heard that one of the suspects was a Black male, defendant's alleged

lover. Mr. Parkinson testified he remembered hearing at the time every word of the argument, but could not later recollect them. He recalled that the Black voice and the female voice were directed against the white male voice in the argument. Mrs. Parkinson testified she did not make out the words.

Evidence was presented to indicate Andy Scrape had discovered and was upset about defendant's affair with Black coworker, Anthony Phillips. About one month prior to his death, Andy Scrape and a friend drove to defendant's office and observed defendant and Phillips hugging and kissing in the parking lot. Defendant and Andy Scrape appeared to argue, then Andy Scrape and his

friend left. Evidence was also presented to indicate defendant had, unbeknownst to Andy Scrape, given $1,000 to Phillips to invest in cocaine, but that the deal had fallen through. A paper in Andy Scrape's underwear drawer with figures totalling up to $1,000 was found after his death.

Telephone records showed that two calls had been placed to Phillips' bepper number from defendant's and Andy Scrape's home at 9:30 and 9:54 p.m. on the night of the killing.. A tape recording of Phillips' voice was played to the jury for the purpose of determining his accent.

After the killing, Phillips visited defendant, who prior to her

arrest on June 7, 1984, was staying with friends and was seen embracing her on the living room sofa one night after the others had gone to bed.

The prosecution's theory was that the argument heard by the Parkinsons' was a lover's triangle fight between defendant, Phillips, and Andy Scrape, and could also have involved the $1,000 cocaine deal. The prosecutor argued to the jury that the evidence supported the inference that defendant ran to the kitchen and brought to the living room the paring knife, which she used to stab her husband in the back while he was struggling with Phillips. Phillips then grabbed the poker and engaged in a frenzied

attack on Andy Scrape's head, while defendant stabbed him several more times. The scene was then altered to make it look like the couple had spent a romantic evening together, defendant took a shower, and Phillips left before defendant ran to her neighbor's for help.

In support of her testimony of spending a romantic evening together and then falling asleep in the bedroom while the killing occurred, defendant introduced evidence of a sound test conducted in the house under circumstances intended to reconstruct the scene as described by defendant. The test indicated that noise ranging from ninety-five decibels could be heard in the Scrapes' bedroom or in the Parkinsons' bed-

room.

Defendant's father and step-father testified that on the Monday after the killing, a detective took a small paring knife with a two or three-inch blade from a kitchen drawer, placed it in a plastic bag, and dropped it into a briefcase. This allegation was denied by the detective involved, who also indicated that a plastic evidence bag would not have been used for a knife.

Finally, several of defendant's friends, including a former spouse, testified to her good character and non-violent personality.

DISCUSSION

A. The judgment is supported by substantial evidence

Defendant's contention that the evidence is not sufficient to support a finding of second degree murder and of use of a deadly weapon is without merit. Whether defendant committed the crime and used the weapon(s) are questions of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment. (People v. Mitchell (1986) 183 Cal. App.3d 325, 329.) We conclude, after reviewing the record with the above in mind, that substantial evidence supports the judgment, that a reasonable trier of fact could find

defendant guilty beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 576.)

The prosecution's theory, that defendant and Phillips, wielding separate instruments, both struck fatal blows and thus aided and abetted each other in the killing, is amply supported by the evidence. The evidence clearly establishes defendant's "presence at the scene of the crime, companionship and conduct before and after the offense," (People v. Mitchell, supra, 183 Cal. App.3d at p. 330), sufficient to support the verdict.

Given the lateness of the hour and the location of the crime, it is reasonably inferrable that the female voice heard by the Parkinsons was

defendant's, and one of the male voices was Andy Scrape's. It is also reasonably inferable that the Black male voice was Phillips. The record indicated Andy Scrape had discovered not only the affair between Phillips and defendant, but also that $1,000 was missing. Moreover, Phillips' number was dialed twice from the Scrapes' home several hours before the killing.

Given the evidence placing defendant and Phillips in the home at about 3:00 a.m., during a violent argument in which their vioces were directed against Andy Scrape's, it is reasonable to infer that defendant and Phillips attacked him simultaneously. The jury could reasonably have inferred from the facts that

(1) Andy Scrape, although fatally injured numerous times, was alive throughout the brutal attack, and (2) the blows to the heard were part of the frenzied attack whereas only four stab wounds were inflicted, that two persons attacked him, rather than just one. The absence of any physical injuries on defendant's body is consistent with this inference because presumably defendant, given her husband's size and strength, would not have been able to escape unscratched had she attacked him alone.

Inasmuch as the killing occurred in defendant's home, it is also inferrable she, with knowledge of location of items, altered the scene of the crime, and cleaned,

buttered, and put away the knife in the dishwasher. Moreover, she was the most likely person to have left the drop of blood in the bathroom before shower, as her hair was wet when she was talking to the neighbors.

In short, the record contains ample evidence of motive (People v. Gonzales (1948) 87 Cal.App.2d 867, 877), opportunity (People v. Baker (1928) 94 Cal.App. 628, 633), and a consciousness of guilt evidenced by the attempt to conceal the act (People v. Peete (1921) 54 Cal.App. 333, 346). All these factors may be legitimately considered by the jury in inferring defendant's identity as the perpetrator of the crime.

B. The Section 1538.5 Motion Was Properly DEnied

Defendant's contention that the trial court improperly denied her motion to suppress evidence obtained prior to the issuance of the warrant is meritless. The seizure of the poker, and the photographing and videotaping of the residence immediately after the crime was reported were permissible plain view activities. Moreover, these activities including fingerprint dusting produced evidence which would in any event have been recovered the next day during the consent search of the house and was therefore admissible. (In re Javier A. (1984) 159 Cal.App.3d 913, 926.) Defendant's reliance on Thompson v.

Louisiana (1984) 469 U.S. 17, and Mincey v. Arizona (1978) 437 U.S. 385, is therefore misplaced.

Defendant's other contention that she did not give consent to the search is also meritless. The question is factual, and the trial court's determination will be upheld if supported by substantial evidence. (People v. Martino (1985) 166 Cal. App.3d 777, 791.) Here, Officer Cuillard's testimony and defendant's conduct and cooperation support the trial court's finding of a consent search.

C. Admission of Evidence Obtained During Trial Was Proper

Defendant's contention that the court improperly admitted evidence

obtained through analyses conducted after the trial began is meritless. Defendant has failed to meet her burden of establishing prejudice from the lack of timely discovery. (People v. Claxon (1982) 129 Cal. App.3d 638, 657-658.)

The challenged evidence, obtained through bed sheet, cat hair, fingerprint, and blood stain pattern analyses conducted after the trial began, was based on physical evidence recovered before trial and available to defendant. We find no evidence of prejudice based on the analyses of these items after the beginning of trial.

The bed sheet and cat hair analyses were not emphasized or commented on at trial, based on our

review of the record.

The fingerprint analysis consisted of reexamination of previously unmatched prints, resulting in the matching of all prints save those that lacked sufficient points of comparison. Although defense counsel in opening argument had pointed out that some of the prints were unmatched, the jury was later informed that defense counsel had not intentionally misled the jury in so stating because at that time there really were unidentified prints.

And the prosecution's blood stain pattern analysis based on examination of photographs of the crime scene could have been met by defendant's own expert, Keith Inman. It

is established that the proper remedy for failure to disclose is to permit the complaining party an opportunity to meet the new evidence. (People v. Reyes (1974) 12 Cal.3d 486, 501-502.) Here, Inman testified that it would take him five to fifteen hours to examine the photographs and read the prosecution's two-page blood pattern analysis report. Although Inman testified that he could probably maneuver the time necessary to conduct this examination prior to being called to testify, he did not do so.

We therefore conclude defendant was not prejudiced by the late discovery of evidence.

D. Evidence Concerning the Affair with Phillips and Cocaine Usage Was Properly ADmitted

Defendant contends the court erred in denying her motion in limine to exclude evidence concerning her alleged affair with Phillips and her alleged cocaine usage pursuant to Evidence Code section 352. Defendant argues, based on People v. Green (1980) 27 Cal.3d 1, that the court committed reversible error in that the record fails to affirmatively show the trial judge did in fact weigh prejudice against probative value. (Id., at p. 25.) We disagree.

Where, as here, the trial court was undoubtedly aware that the evidence in question was imbued with the substantial danger of prejudice

that is inherent in proof of an extramarital affair between a White woman and a Black man, and drug usage, and where the issue of whether the probative value of the evidence outweighed its prejudicial effect was before the court and plainly formed the basis of its ruling admitting the evidence the court's omission to recite for the record its implied finding that probativeness outweighed prejudice did not result in a miscarriage of justice. (People v. Frank (1985) 38 Cal.3d 711, 732.) Accordingly, any alleged error was harmless. (People v. Watson (1956) 46 CA1.2d 818, 836.)

E. Evidence Concerning the Incidence Of Hot Prowl Burglaries Was Proper

Defendant's contention that evidence of the small percentage of night time or hot prowl burglaries was prejudicial , speculative and immaterial is meritless. The testimony by a twenty year veteran of the Van Nuys Division of the Los Angeles Police Department, which includes the area of the Scrape residence, was that 95% of residential burglaries are committed before 9:00 p.m., and that the remaining 5% were nighttime burglaries. He further testified that a hot prowl burglar usually works alone and would if contronted, flee; residential robbers usually don't work alone and are usually armed with a gun. This evidence was

relevant and material evidence to assess the credibiliity of defendant's explanation that an outsider entered the home, removed Andy Scrape's wallet, necklace, and athletic equipment, was confronted by Andy Scrape, and killed him with the poker and knife. There was no abuse of discretion in determing the relevancy of this evidence. (People v. Reeve (1980) 105 Cal.App.3d 444, 452.)

Defendant's other argument that the officer's testimony amounted to an impermissible assessment that the statistical probability of defendant's guilt was 95%, in violation of People v. Collins (1968) 68 Cal. 2d 319, 320, is misplaced. Here there was no evidence of a statistical probability as to defendant's

guilt.

F. The Parkinsons' Testimony Was Properly Admitted

Defendant contends the testimony of the Parkinsons concerning the following matters should have been excluded following Evidence Code section 402 hearings: the ethnicity of the voices, the sex of the voices, the precise number of the voices, the precise location of the voices, the belief that the two female voices were the same (the voice in the argument and the voice stating "he's dead"), the opinion that the female was yelling at the white male, and the opinion that the squealing tires were leaving the Scrape residence. We disagree.

The trial court's decision to admit the Parkinsons' testimony concerning the above listed matters was clearly a proper exercise of discretion. Their testimony was properly admitted as both rationally based on their perceptory sense of hearing, a proper basis for identification type testimony (Connell v. Clark (1948) 88 Cal.App.2d 941, 947), and as opinion testimony pursuant to Evidence Code section 800. to be admissible, evidence neet not absolutely confirm anything. (People v. Peggese (1980 102 Cal.App.3d 415, 420.) The weight to be given their testimony was for the jury's determination. (People v. Deletto (1983) 147 Cal.App.3d 458, 478.)

The court's alleged failure to

recite for the record its implied finding that the probative value outweighed prejudice does not constitute a miscarriage of justice. (People v. Frank, supra, 38 Cal.3d 711, 732.) The trial court explicitly stated that it had read and considered defendant's written motion in limine, which expressly raised the Evidence Code section 352 argument. In the face of a clear showing that the evidence was properly received, the court's omission to recite for the record its implied finding did not result in a miscarriage of justice. Accordingly any error was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

G. The Involuntary Manslaughter Instruction Was Not Warranted

The trial court's refusal of defendant's requested involuntary manslaughter instruction was not error. The record fails to support her alleged inability to harbor intent to kill because of voluntary intoxication. (People v. Ray (1975) 14 Cal.3d 20, 31.) Moreover, the diminished capacity defense is no longer available. (People v. Ventura (1985) 174 Cal.App.3d 784, 788-790.)

H. The Post-Conviction Hypnosis Request Was Properly Denied

Defendant's post conviction motion to order the Parkinsons to undergo hypnosis for the purpose of assisting their recollection of the

words they may have heard during the argument they overheard was properly denied. In California, a person hypnotized for investigative purposes may not testify as a witness to the events that were the subject of questioning during hypnosis. (People v. Shirley (1982) 31 Cal.3d 18, 68.) Authorities cited by defendant from other jurisdictions are inapplicable.

DISPOSITION

The judgment is affirmed.

not for publication.

THOMPSON, J.

We Concur:

LILLIE, P.J.

JOHNSON, J.

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 7, No. B015302
S002618

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

TERRI LYNN SCRAPE

SUPREME COURT
FILED
DEC 2 1987
Laurence P. Gill,
Clerk

DEPUTY

Appellant's petition for review DENIED.

LUCAS

Chief Justice

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987
NO. 87-1434

TERRI LYNN SCRAPE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN K. VAN DE KAMP, Attorney General
of the State of California
STEVE WHITE,
Chief Assistant Attorney General
WILLIAM T. HARTER,
Supervising Deputy Attorney General
KEITH H. BORJON,
Deputy Attorney General
and Counsel of Record
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-3213

Attorneys for Respondent

QUESTIONS PRESENTED

I

Once police are lawfully in a position to observe a murder scene, does a person retain a Fourth Amendment privacy interest in the murder scene to prevent recording, in this case recording by videotape, photographs, and the laying of fingerprint dust, of items in plain view?

II

Even assuming arguendo that a person retains a privacy interest in items in plain view to prevent them from being recorded by videotape, photographs, and the laying of fingerprint dust, does a state deny that person due process of law when it is held for the first time on appeal that such recordings would have been inevitably discovered?

III

Does a denial of a post-trial motion to hypnotize prosecution witnesses for investigative purposes deny the convicted person due process of law?

IV

Is a second degree murder conviction unsupported by the record so as to be a denial of due process of law where the record established that (1) the defendant was having an affair with a man (2) the victim-husband found out about the affair and confronted the defendant-wife and the lover (3) on the night of the murder, the defendant-wife called her lover twice on the telephone (4) on the night of the murder, neighbors of the victim-husband and the defendant-wife overheard a loud argument and scuffling involving the lover, the victim-husband

and the defendant-wife (5) there is evidence showing the murder scene had been altered after the murder, (6) there is evidence showing one of the two murder weapons, a knife, had been hidden in the dishwasher (7) there is evidence showing the defendant showered immediately after the murder to wash off blood (8) the defendant-wife and her lover continued their relationship after the victim's death.

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JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code section 1257(3).

STATEMENT OF THE CASE

A. Summary of Proceedings Below

In an information filed by the District Attorney of Los Angeles County, California, petitioner was charged with the murder of Andy Scrape, a violation of California Penal Code section 187. It was further alleged that in the commission and attempted commission of the murder, petitioner personally used a deadly and dangerous weapon, to wit, a knife and/or fireplace poker, within the meaning of California Penal Code section 12022(b). (C.T. p. 388.)[1/] Petitioner was

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1. "C.T." refers to the Clerk's Transcript on appeal, which contains the charging documents, legal motions, minute

arraigned, pled not guilty, and denied the deadly weapon use allegation. (C.T. p. 402A.)

Petitioner's motion to dismiss pursuant to California Penal Code section 995 was denied. (R.T. p. 438-A.) Petitioner's motion to suppress pursuant to California Penal Code section 1538.5 was denied. (C.T. p. 585A.) Trial was by jury. (C.T. p. 610.)

Petitioner was found guilty of murder in the second degree. The jury also found true the allegation that petitioner had personally used a deadly and dangerous weapon within the meaning of California Penal Code section 12022(b). (C.T. p. 734.) Probation was denied, and petitioner was sentenced to state prison

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orders, jury instructions, and verdict forms filed in this case.

for a total term of sixteen years to life. (C.T. pp. 737-738.)

Petitioner timely pursued on appeal to the California Court of Appeal for the Second Appellate District of California, Division Seven. The judgment of conviction was affirmed on appeal in a decision filed August 25, 1987. (Appen. A to Petn. for Writ of Cert.) Petitioner's petition for review in the California Supreme Court was denied on December 2, 1987. (Appen. B. to Petn. for Writ of Cert.)

Petitioner's Petition for Writ of Certiorari seeks review of the decision of the California Court of Appeal, Second Appellate District, Division Seven, dated August 25, 1987.

B. **Statement of Facts Relating to the Motion to Suppress Evidence**

Los Angeles Police Officer Thomas Cuillard was one of the investigating officers in the case. He first heard about the case at 4:20 a.m. on May 13, 1984, when he received a telephone call. He arrived at the scene of the crime at 14978 Chase Street at approximately 5 a.m. (Aug. R.T. p. 3.) Officer Cuillard went inside the residence and observed the dead body of Andy Scrape. The wounds did not appear to be self-inflicted. (Aug. R.T. p.4.)

Officer Cuillard first talked to petitioner at the Van Nuys Police Station at 6 a.m. After talking to petitioner at the police station, Officer Cuillard had a subsequent conversation with her on the

telephone. Officer Cuillard asked petitioner if he could go into the house and complete some scientific investigation tests as well as have petitioner walk through the house with the officers to determine if there were any items missing. Petitioner responded in the affirmative to both requests and they set a time of 10 a.m. the following day, Monday, May 14. (Aug. R.T. pp. 7-9.) Petitioner was not a suspect at this time. (Aug. R.T. p. 5.)

Officer Cuillard arrived at the residence at approximately 10 a.m. on May 14. Several people, including petitioner, were standing outside the residence. (Aug. R.T. pp. 9-10.) One of these parties gave Officer Cuillard a key and he opened the house with it. Just as Officer Cuillard opened the door and stepped inside, a Mrs. Parkinson followed

the officer a couple of steps inside the door and asked if she could speak to him. Believing that she was with petitioner's party of individuals he indicated that she could. She identified herself as being a neighbor. Officer Cuillard responded, "Oh, I thought you were with the party." Officer Cuillard then stated, "Why don't we step outside then." They stepped to the rear of the house while the rest of the party waited on the patio outside of the front door. Officer Cuillard had a two or three-minute conversation with Mrs. Parkinson. Mrs. Parkinson indicated that she had been awakened on the 13th at approximately 3 a.m. by arguing and a fight coming from petitioner's residence. At that time Officer Cuillard set up an appointment to meet with Mrs. Parkinson at the Van Nuys Police Station at

approximately 7 p.m. for the purpose of interviewing her. Mrs. Parkinson left the house. (Aug. R.T. pp. 9-12.)

Officer Cuillard went back inside the house with the criminalist, Charles Caudell. Mr. Caudell performed various tests including spraying chemicals at certain portions of the house. Thereafter, Officer Cuillard and the criminalist left the residence. (Aug. R.T. p. 12.) Officer Cuillard returned to the house on Wednesday with a search warrant, E-7520. (Aug. R.T. pp. 12-13.) Sometime prior to the consent search on May 14, a videotape was made of the entire house and various parts of the house had been dusted with fingerprint powder. (Aug. R.T. pp. 18-19, 26-27.)

Petitioner denied giving Detective Cuillard or anybody else

permission to do any testing or searching of her home. Petitioner had no knowledge that anyone would be at her house on Monday morning until she arrived at that location. (Aug. R.T. pp. 53-54.) Petitioner did not want to enter the house on Monday, but Detective Cuillard told her that she had to. (Aug. R.T. pp. 54-55.) After entering the house petitioner noticed that it was messy. There was black dust around and things had been moved. Officer Cuillard told petitioner, "Don't be alarmed. The house is messy because we have had a fingerprint man in here." (Aug. R.T. p. 55.) No police officer had asked petitioner on that Monday for permission to go into the house to perform any tests or to search it. (Aug. R.T. p. 56.)

C. Evidence Presented at Trial

Andy Scrape and petitioner were married in February 1983. (R.T. p. 570.) They lived at 14938 Chase Street in Panorama City, California. (R.T. p. 3.) They had been burglarized several times. (R.T. p. 221.) Because of these burglaries Andy installed a wrought iron gate in the front walkway to the house. It had a dead bolt lock and Andy kept it locked for security purposes. (R.T. pp. 15, 223, 377-378, 490-491, 574-575, 588.)

Wallace Burney had known Andy Scrape for about ten years. On either the 11th or 18th of April, Mr. Burney and Andy went to petitioner's place of employment. They drove around the back to park the car. When they turned in the alley they observed petitioner and Anthony Phillips, who is black, hugging. (R.T. pp. 379-380,

383.) Andy Scrape walked over to petitioner and Phillips and confronted them. (R.T. p. 382.) In Mr. Burney's opinion, Andy Scrape's marriage was deteriorating. (R.T. pp. 386-387.)

Dorothy Wakamatsu was good friends with petitioner. She worked with petitioner at Analex. (R.T. p. 443.) One evening in April 1984, Mrs. Wakamatsu noticed some commotion in the parking lot. She observed petitioner and Andy Scrape in the parking lot.[2/] (R.T. p. 444.)

Petitioner worked for Helmut Dierenger at Analex Laboratories in Inglewood, California. (R.T. p. 431.) Anthony Phillips also worked at that business. (R.T. p. 432.) In May of 1984

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2. Ms. Wakamatsu testified at the preliminary hearing that appellant was having an affair with Anthony Phillips. (R.T. p. 447.)

there were four beepers for the company. One had been assigned to Phillips. (R.T. p. 432.) If an individual wanted to contact Phillips he or she would dial the number 460-8455, wait a second, dial 26418, wait for two beeps in the phone and then dial the telephone number. (R.T. p. 433.)

On May 12, 1984 at 9:30 p.m. and again at 9:54 p.m. the telephone number 460-8455 was dialed from the Scrape residence. (R.T. pp. 568-569.)

On May 12, 1984, Robert Parkinson went to bed sometime between 10:00 p.m. and midnight. (R.T. p. 337.) He was awakened at approximately 3:05 a.m. by noises coming from the Scrape house. (R.T. p. 338.) Mr. Parkinson heard three voices, two males and one female. A loud violent hostile argument was going on.

The female voice appeared to be caucasian. The two males voices appeared to be one caucasian and one black. (R.T. p. 339.) The female appeared to be directing her voice to the caucasian male. The black male also appeared to be directing his voice toward the caucasian male. (R.T. p. 340.) The caucasian male appeared to be directing his voice toward both the female and the black male. This occurred for possibly a minute or two. Mr. Parkinson attempted to go back to sleep. (R.T. p. 342.)

Approximately 15 and 20 minutes later, Mr. Parkinson heard the sound of heavy furniture being moved or thrown about. (R.T. p. 342.) The sound Mr. Parkinson heard was something heavy being pushed up against a wall or sliding door. (R.T. p. 343.) The next distinct

sound that Mr. Parkinson heard was a car leaving and going up the street. Within approximately a minute Mr. Parkinson heard the female voice state, "He's been killed." (R.T. pp. 344-345.) The time was approximately 3:40 a.m. (R.T. p. 345.) The voice stating that he had been killed was the same voice that Mr. Parkinson had earlier heard in the argument. (R.T. p. 350.)

Judith Parkinson was also awakened by the loud voices. On prior occasions, she had heard arguments between a male and female voice coming from the Scrape residence. On this occasion she heard two male voices and one female voice. Ms. Parkinson recognized the female and one of the male voices as the two she had heard in the past. One of the male voices sounded like that of a

caucasian and the other male voice sounded like that of a black person. (R.T. pp. 655, 657, 660.) It was an argumentative situation. (R.T. pp. 653-655.) She also heard a female voice screaming, "He's dead." (R.T. p. 658.)

On May 13, 1984 Sylvia Terry was living across the street from Andy Scrape and petitioner. Sylvia was awakened at approximately 3:30 a.m. by a dog barking viciously. Five to ten minutes later she heard petitioner at her gate yelling for Sylvia to wake up. Petitioner told Sylvia, "Andy's been hurt. He's been hurt real bad." Petitioner told Sylvia to call the police. Petitioner never asked Sylvia to call an ambulance. (R.T. pp. 207-209.)

While waiting for the police to arrive petitioner told Sylvia, "Andy's

been hurt. He's been hurt real bad." "They came back and they hurt him. They hurt him real bad." (R.T. p. 210.) Sylvia asked petitioner how Andy was and petitioner responded that she did not know. (R.T. pp. 210-211.) Petitioner told Sylvia that she and Andy were supposed to go sailing but did not because of their allergies and they decided to stay home. They watched TV and laid a blanket in front of the fireplace. They made love, fell asleep, woke up, made love again, and then fell asleep. Petitioner took a shower. (R.T. p. 211.)

Petitioner then went to bed. She woke up a while later and found that Andy was not in bed. She went to investigate and found him lying in a pool of blood in the living room. Petitioner then ran out of the house. (R.T. p. 212.) Petitioner

was barefoot and dressed in a full length robe. (R.T. p. 215.)

At approximately 4:00 a.m. on May 13, 1984, Paramedics Supervisor Michael Kleiner responded to a call at the 14900 block of Chase Street. There were two females and a male waiting outside. One of the females was petitioner. (R.T. pp. 100, 101.) Mr. Kleiner asked petitioner what was wrong. Petitioner indicated she had been awakened by a noise in her house, and had found her husband lying in the living room. Being concerned for her safety, she went across to her neighbor's house to get help. (R.T. p. 102.) Approximately six minutes after the paramedics arrived, a police unit arrived at the location. (R.T. p. 103.)

The officers and the paramedics entered the residence. They found Andy

Scrape lying inside. He was pronounced dead. (R.T. p. 104.) Neither Mr. Kleiner nor his partner turned on or off any lights in the house. (R.T. pp. 104, 106.)

Sean Broeshaar accompanied Michael Kleiner that evening. (R.T. p. 109.) Mr. Broeshaar did not turn on or shut off any lights in the house. (R.T. p. 110.)

Los Angeles Police Officer Greg Mangiagli responded to 14938 Chase Street on May 13, 1984. Officer Mangiagli did not turn on or shut off any lights in the house. (R.T. pp. 113-114.) Los Angeles Police Officer Mark Abrams also responded to that location. (R.T. p. 119.) He did not turn on or shut off any lights in the house. (R.T. p. 120.)

Officer Allison MacKinzie also responded to the crime scene arriving at

approximately 3:55 a.m. (R.T. pp. 122-123.) The initial call had indicated there may be suspects still inside the residence. Officer MacKinzie wanted to determine whether there were people still inside the house. Petitioner told the officer that her husband was inside the house and was hurt. Petitioner also indicated she thought that the people were still inside. At that point Officer MacKinzie called for a backup unit before entering the house. (R.T. pp. 124-125.)

Officer Gordon went to the rear of the house to secure it and see if there were any suspects at that location. (R.T. p. 125.) The officers entered the house through a back glass sliding door. Officer MacKinzie did not have to open the door. It was already open. (R.T. p. 126.) Immediately upon entering the

residence Officer MacKinzie observed the victim lying on the living room floor face up and a lot of blood. (R.T. p. 127.) When Officer MacKinzie entered the house she did not turn on or shut off any lights. (R.T. p. 128.)

After observing the victim, Officer MacKinzie left the house and reinterviewed petitioner. Petitioner said that she and her husband had not seen each other much that week, that they had both been working a lot. They watched TV until approximately 8:30 in the evening and then turned off the TV. They built a fire in the fireplace and drank some wine. They then made love in front of the fireplace and fell asleep. Petitioner indicated she woke up around 1:00 in the morning, took a shower and went to bed. Her husband indicated he would go to

bed later. (R.T. pp. 128-129.) Petitioner indicated that about 3:00 a.m. she awoke and went into the living room to find out why her husband had not come to bed. She turned on the light and saw her husband lying in a pool of blood. At that time petitioner ran out of the house. Petitioner indicated she did not touch her husband when she saw him. (R.T. p. 130.)

Officer MacKinzie went into the master bedroom of the house. The bed did not appear to have been slept in. (R.T. p. 131.) At about 5 a.m. Officer MacKinzie looked at the shower in the house. It was wet. (R.T. p. 130.) A video crew arrived several hours after the officers had left the scene and went through the house. (R.T. p. 135.)

Los Angeles Police Officer Agnes Gordon went to the crime scene along with

her partner, Officer Allison MacKinzie. There was a male and two females outside of the residence. One of the females was petitioner. (R.T. pp. 144-145.)

Officer Gordon immediately went to the house through the front gate to the backyard since she had heard there was a possibility suspects were inside the house. She had to walk up a driveway through a wrought iron gate down a sidewalk. She did not have to unlock the gate. (R.T. p. 146.) This gate was not locked in any way. She immediately went into the backyard and checked for footprints to see if any grass was disturbed or anything of that nature. Officer Gordon did not observe any footprints on the lawn. Lying on the grass were a gym bag, a tennis racket, a towel, a pair of pants and a fireplace

poker. (R.T. p. 147.)

There were two rear sliding glass doors to the house. The door in the east was open approximately one to two feet. (R.T. p. 148.) Officer Gordon went inside the house. She did not have to turn on any lights. (R.T. p. 149.)

Los Angeles Police Officer Myrl Thorne arrived at the crime scene shortly after 4:00 a.m. (R.T. p. 157.) Officer Thorne and her partner, Officer Cunningham, were the first officers to enter the residence. Officer Thorne turned on three light switches lighting the outside porch light, an entry light by the door, and a lamp in the front door. (R.T. p. 159.) Officer Thorne searched the house but did not find any suspects. The victim was lying on the living room floor and appeared to be dead. He was

lying near the fireplace. (R.T. p. 161.) When the officer went into the bedroom, the bedroom light was already on. (R.T. p. 173.)

In the early morning hours on May 13, 1984, Los Angeles Police Officer Albert Cunningham went to the crime scene. (R.T. p. 179.) Officers Gordon and MacKinzie were already at that location. Officer Cunningham entered the residence along with Officer Thorne. Officer Cunningham was able to see someone lying on the floor before Officer Thorne put on the light switches in the house. (R.T. p. 181.) Officer Cunningham informed Officer Thorne that they had an open back door. (R.T. p. 182.) There was a light on as the officer entered the residence before Officer Thorne turned on the lights. (R.T. p. 182.)

The open sliding glass door was open approximately 14 inches to 18 inches. There was a light colored drape that was hung up over the handle in a manner through which one could look out to the backyard. (R.T. p. 183.)

Officer Cunningham talked to petitioner at the location. (R.T. p. 185.) Officer Cunningham asked petitioner, "What was your husband's name?" Petitioner blurted out, "He's dead." Petitioner then stated, "Isn't he?" Officer Cunningham indicated he did not say that and that the paramedics were working on petitioner's husband. (R.T. p. 186.) Petitioner later told Officer Cunningham she had taken a shower at 1 a.m. and then went to bed. R.T. p. 193.)

At approximately 4:10 a.m. on

May 13, 1984, Los Angeles Police Sergeant John Rygh went to the crime scene. He entered the yard to the residence to check for any evidence or indication of the person or persons who might have climbed over any of the walls and passed through any of the flower beds immediately prior to entry into the house. (R.T. pp. 330-331.) No footprints were observed. (R.T. p. 331.) It appeared that the walls had not been touched or climbed over. (R.T. p. 331.)

Los Angeles Police Officer Roger Pida went to the crime scene at 5:06 a.m. (R.T. p. 756.) An officer assigned to take photographs accompanied Officer Pida. They walked through the entire house looking for signs of a struggle. (R.T. pp. 756-757.) There were signs of a struggle in the living room area. (R.T.

p. 758.)

Tonia Laister lived near the Scrape residence. At approximately 3:20 a.m. on May 13, 1984, she came in contact with petitioner. She had the opportunity to feel petitioner's hair. It was wet. Petitioner's hair smelled like it had just been washed. The hair felt like petitioner had washed it in the last ten to fifteen minutes. (R.T. pp. 478-480.)

Later at the police station petitioner asked Officer Thorne how her husband was. Officer Thorne informed petitioner that he was dead. (R.T. p. 163.) Officer Thorne never refused to tell petitioner about her husband's condition. Neither did Officer Thorne refuse to allow petitioner to make a phone call. (R.T. p. 164.)

Los Angeles Police Detective

Thomas Cuillard was the investigating officer on the case. (R.T. p. 245.) On May 13, 1984, Detective Cuillard had a conversation with petitioner at the Van Nuys Police Department at approximately 6:15 a.m. Petitioner indicated she arrived home from work at approximately 3:00 p.m. on Saturday afternoon. She and her husband (Andy Scrape) had intended to make a very pleasant evening. At approximately 8:30 p.m. petitioner and Andy went into the living room taking a blanket with them and laid that in front of the fireplace. They drank champagne. They fell asleep. After waking up, they made love and fell asleep again. After waking up, they again made love and again fell asleep. They woke up and made love a third time. Petitioner stated that they did not engage

in an act of sexual intercourse but rather had oral sex. (R.T. pp. 247-248.)

At 1 a.m., petitioner got up and took a shower. (R.T. p. 249.) After taking a shower she put on a bathrobe and laid across the bed waiting for her husband, Andy, to come in. (R.T. p. 250.) Petitioner fell asleep. Sometime later, she woke up and realized Andy was not there. She also realized that the lights and the stereo were still on. (R.T. p. 251.) Petitioner went into the living room area. She saw Andy lying on his back in the middle of the living room and thought he was asleep. Petitioner turned off the stereo. She then walked across the living room to the dimmer switch and turned on the dining room light at which point she observed Andy covered with blood. Realizing he was hurt, she ran out

of the house. Petitioner stated she did not have to unlock the front gate, that it was already open. (R.T. p. 252.)

Petitioner told Detective Cuillard that it had been a very pleasant evening and that she and Andy had not argued. Petitioner indicated that she did not go up to the body or touch it in any way. (R.T. p. 254.)

Pamela Scrape, Andy's sister, was notified of her brother's death at approximately 6:30 a.m. on May 13, 1984. She talked to petitioner about the events of the evening of May 12 and 13. Twice during the conversation petitioner said to the effect, "He was so cold." (R.T. pp. 569-574.)

Jeffrey Pill had known Andy Scrape for approximately ten years and was a good friend of his. Mr. Pill owned a

boat with Andy. (R.T. p. 587.) Jeff was present when petitioner made the statement to Pam Scrape that Andy, "He was so cold. Andy was so cold. He was so cold." (R.T. p. 591.)

Eugene Silverman knew petitioner and Andy Scrape. (R.T. p. 2.) On the day of the murder, petitioner told Eugene and Donna Silverman that she and Andy had spent a very pleasant evening together. She went to bed, leaving Andy in the living room. A little later she was awakened. She went to the living room, turned on the light, and saw Andy lying on the floor with blood around him. She then ran out of the house. (R.T. pp. 4-5, 38.)

Doreen Music, a Los Angeles Police Department Criminalist, went to the Scrape residence on May 16, 1984. A knife (Peo. Exh. 17) was discovered in the

dishwasher. It appeared to have a buttery substance on it. (R.T. pp. 506-507.) The other utensils in the dishwasher appeared to be clean in comparison to the knife. (R.T. p. 778.) Tests were performed on the knife which indicated that there were traces of blood on it. (R.T. pp. 508-509.)

A hamper in the master bedroom was also examined with respect to a spot on it which resembled blood. That spot was tested and reacted positive for the presence of blood. (R.T. p. 510.) There also appeared to be a blood spot on the front closet door. That was tested and also reacted positive. There was also a positive reaction with respect to a substance on the dimmer switch in the living room. (R.T. p. 511.) Ortho-Tolidine was sprayed on the

floor in the entry way and a positive reaction for blood was obtained. The chemical reaction was in the shape of partial shoe prints. The prints appeared to be in the direction of the hallway that led to the bedrooms. (R.T. p. 513-515.)

Los Angeles Police Department Criminalist Eston Schwecke conducted some blood testing in connection with the case. (R.T. p. 548.) A poker (Peo. Exh. 21) was tested and Mr. Schwecke found blood on it. (R.T. p. 549.) The blood was tested and found to be Type A human blood. (R.T. p. 550.) Mr. Schwecke also tested a knife (Peo. Exh. 17) and found Type A human blood. (R.T. p. 551.) The same result was obtained from testing the vinyl piece from the hamper. (R.T. p. 552.) Andy Scrape's blood was determined to be Type A. (R.T. p. 553.)

Los Angeles County Deputy Medical Examiner Sarah Reddy performed the autopsy on Andy Scrape. She ascribed Mr. Scrape's cause of death to three specific types of injury. He had blunt force trauma to the head, multiple stab wounds, and trauma to the neck. A poker which Dr. Reddy had been shown by either Detective Cuillard or Detective Pida was consistent with the blunt force trauma to the head. A knife which had been shown to Dr. Reddy by these two detectives was consistent with the stab wounds. (R.T. pp. 405-408.)

There were possibly 17 blows to the head. Any one of these blows might have been fatal. There were four stab wounds on the chest. One of the stab wounds entered the heart. It was a fatal wound. There were also superficial wounds to the face and on the arms. (R.T. pp.

411-414.) The blunt force trauma and the stab wounds were inflicted while the victim was alive. (R.T. pp. 419-420.)

City of Los Angeles Criminalist Ruben Flores was experienced in blood splatter analysis. (R.T. pp. 688-689.) The term "wiping" in terms of blood stain analysis means the distortion of a blood stain that is existing on a particular surface. If the surface has blood on it and another object is wiped across it, the blood would essentially smear and that is what is denoted a "wipe." (R.T. pp. 689-690.)

Mr. Flores prepared a report indicating that the blood stain patterns on the fireplace indicated at least four separate events resulting in blood splatterings. (R.T. p. 690.) Mr. Flores also reached the conclusion that there

were at least two separate events that resulted in blood staining on the fireplace hearth that occurred prior to the ice bucket coming to rest in its final location. (R.T. p. 691.)

Steve Marz had known petitioner and Andy Scrape approximately a year at the time of Andy's death. He met them through Dorothy Wakamatsu who was Steve's girlfriend. (R.T. pp. 490-491.) Dorothy admitted to Steve that she had misled the police about not knowing anything about an affair between Mr. Phillips and petitioner. Dorothy admitted that she was aware of such an affair. (R.T. pp. 499-500.) Dorothy also told Steve that petitioner had loaned Anthony Phillips approximately a thousand dollars. (R.T. p. 500.)

Mr. Silverman first met Anthony

Phillips (as depicted in Peo. Exh. 2) the night Andy was killed. (R.T. p. 9.) Petitioner stayed at Mr. Silverman's house from May 13 until the early part of June. During that three and a half week period, Mr. Phillips came over to the house about a half a dozen times. Petitioner and Mr. Phillips went for a walk together on one occasion. On another occasion they said they were going out for a drink together. (R.T. pp. 10-11.) On one occasion while petitioner was still staying at Mr. Silverman's house, Mr. Silverman retired for the evening. Anthony Phillips and petitioner were watching TV. Mr. Silverman said good night to them and went to bed. He woke up sometime after that and noticed there was a light on. Mr. Silverman entered the living room and saw petitioner and another

person sitting on the couch embracing. The other person's hands were black. (R.T. pp. 12-13.) Mr. Silverman was not able to see this other person's face. (R.T. p. 14.)

ARGUMENT

I

NO SPECIAL AND IMPORTANT REASON FOR GRANTING REVIEW IN THIS COURT ON THE FOURTH AMENDMENT ISSUE EXISTS SINCE THE DECISION OF THE STATE COURT IS IN CONFORMITY WITH ARIZONA V. HICKS (1987) ___ U.S. ____; 107 S.CT. 1149

Petitioner contends that this Court should grant her petition for writ of certiorari and review this case because the police violated the precepts of Thompson v. Louisiana (1984) 469 U.S. 17 and Mincey v. Arizona (1978) 437 U.S. 385 when police, once lawfully in a position to view the murder scene, recorded items in plain view through videotaping, photographing and the laying

of fingerprint dust.[3/] The California Court of Appeal held that "the photographing and videotaping of the residence immediately after the crime was reported were permissible plain view activities." (Appen. A to Petn. for Writ of Cert., p. A-22.) Respondent respectfully submits that no Fourth Amendment violation occurred because, as this Court held in Arizona v. Hicks (1987) ____ U.S. ___, ___; 107 S.Ct. 1149, 1152, the recording of items in plain view made by police lawfully in a position to observe such items does not constitute a seizure.

It is fundamental that the Fourth Amendment protects a person's legitimate

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3. There is no evidence anywhere in the suppression hearing record that police actually obtained any fingerprints prior to the consent search.

expectations of privacy rather than just places. (Illinois v. Andreas (1982) 463 U.S. 465, 771.) "If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." (Ibid.)

In Arizona v. Hicks, supra, ____ U.S. ___ at pages. ____; 107 S.Ct. at pages 11521-1152, police arrived at an apartment that appeared to be the source of a shooting into another apartment. Police entered the apartment searching for the shooter and found three weapons, including a rifle. An officer also saw two sets of stereo components and suspected they were stolen. He recorded the serial numbers of the components, moving some, in order to do so.

This Court held that "the mere

recording of the serial numbers did not constitute a seizure." (Arizona v. Hicks, supra, ____ U.S. ____ at p. ____; 107 S.Ct. at p. 1152.) "In and of itself. . . [the recording] did not 'meaningfully interfere' with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to seizure [citation]." (Ibid.)

By the same analysis, here, the mere recording of what the murder scene looked like through videotaping, photographing, and the laying of fingerprint dust did not constitute a seizure. The recording did not meaningfully interfere with any reasonable expectation of privacy petitioner might have in items in plain view to the police.

Petitioner does not dispute the

lawfulness of the search of the entire murder scene for possible suspects when the police first arrived at the scene. Indeed, it was at petitioner's urging that the officer's searched petitioner's home for possible burglary suspects. Given the lawfulness of this search, petitioner does not and cannot argue that she had a reasonable expectation of privacy in her home to prevent those officers from testifying to anything they would have seen in the home during that search. It follows that petitioner also had no reasonable expectation of privacy to prevent the recording of what police had already lawfully seen.

In Maryland v. Macon (1984) 472 U.S. at pages 468-469, this Court held that a seller of obscene material did not have a reasonable expectation of privacy

in items exposed to the public for sale. This Court reasoned that "[t]he mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities, whether because a customer will not complain or because undercover officers will not transact business with the store, is not one that society is prepared to recognize as reasonable." (Id., at p. 469.)

Similarly, petitioner's expectation that the possibly incriminating nature of plain view items at the murder scene would not have come to the attention of police simply because the officers who lawfully viewed the entire crime scene may not have noticed or later been able to recall everything they viewed is not reasonable. Because petitioner had no reasonable expectation of privacy in

items lawfully viewed by police, the recording of those items by videotaping, photographing, and the laying of fingerprint dust did not constitute a search subject to the warrant requirement of the Fourth Amendment.

II

EVEN ASSUMING ARGUENDO POLICE VIOLATED PETITIONER'S FOURTH AMENDMENT RIGHTS, NO SUBSTANTIAL AND IMPORTANT REASON EXISTS FOR GRANTING REVIEW ON INEVITABLE DISCOVERY ISSUE BECAUSE THE RECORD ON THE ISSUE HAS BEEN FULLY DEVELOPED

Petitioner contends that this Court should grant her petition for writ of certiorari and review this case because she was denied due process of law in that the California Court of Appeal, in

addition to erroneously holding that the police videotaping and photographing constituted permissible plain view activities, applied the inevitable discovery doctrine on appeal without giving petitioner an opportunity to litigate whether the evidence obtained in the videotaping and photographing would have been inevitably discovered. Respondent respectfully disagrees because the record has been fully developed as to whether the evidence obtained through photographing and videotaping would have been inevitably discovered by other lawful means.

When evidence is obtained as the result of an unlawful search and seizure, that evidence is nonetheless admissible when the prosecution shows it is more likely than not that the evidence would

have inevitably been discovered by other lawful means. (Nix v. Williams (1983) 467 U.S. 431, 444.) Petitioner does not dispute the validity of this doctrine. Petitioner, citing Singleton v. Wulff (1976) 428 U.S. 106, 120-121 and Armstrong v. Manzo (1978) 380 U.S. 345, 352, only disputes its applicability here because she was never given the opportunity to show that the integrity of the evidence recorded in the photographs and videotape would have diminished before any lawful manner of recording could have occurred.

A hearing on whether plain view recordings would have inevitably been discovered was unnecessary. Blood splatter analysis of the crime scene based on photographs revealed that the crime scene had been altered after the murder. (R.T. pp. 689-691.) Petitioner does not

and cannot point to any possible way that the blood splatter evidence would not have been discovered during the consent search conducted one day later. As to the evidence of water droplets in the shower, assuming for the sake of argument only that the droplets would have evaporated by the time of the consent search, petitioner cannot explain how one of the officers who first arrived at the crime scene and searched the house could have been prevented from testifying to water droplets in the shower. (R.T. pp. 160-161, 167.) Indeed, shortly after entering petitioner's residence, one of the officers on the scene saw water in the shower. (R.T. pp. 130-131.) Thus, petitioner cannot show that the taking of additional evidence on this issue could have precluded the application of the

inevitable discovery doctrine on appeal.

III

NO SUBSTANTIAL AND IMPORTANT REASONS EXISTS FOR GRANTING REVIEW OF A DENIAL OF A POST-CONVICTION REQUEST TO HYPNOTIZE PROSECUTION WITNESSES FOR INVESTIGATIVE PURPOSES WHERE THE STATE DECISION IS IN CONFORMITY WITH ROCK V. ARKANSAS (1987) ____ U.S. ___; 107 S.CT. 2705

Petitioner contends that this Court should grant her petition for writ of certiorari and review this case because she was denied due process of law by California's law governing the use of hypnotically refreshed testimony, which, in petitioner's view, prohibits the use of "all posthypnotic testimony sought to be introduced on a defendant's behalf" and

resulted in the trial court denying her post-trial motion to order two prosecution witnesses to undergo hypnosis "for investigative purposes." Respondent respectfully submits that California law on the use of hypnotically refreshed testimony is in complete conformity with this Court's decision in Rock v. Arkansas (1987) ___ U.S. ___; 107 S.Ct. 2705 and a denial of a post-conviction request to hypnotize prosecution witnesses for investigative purposes does not violate due process of law.

In Rock v. Arkansas, supra, ____ U.S. ____; 107 S.Ct. 2705, this Court held that a criminal defendant's right to testify at trial may not be restricted by a state rule that prohibits the use of all hypnotically refreshed testimony. In promulgating this rule, this Court quoted

with approval the California rule on the use of hypnotically refreshed testimony, People v. Shirley (1982) 31 Cal.3d 18; cert. denied, 459 U.S. 860 (1982), which explicitly excepted testimony by an accused from its rule against the use of hypnotically refreshed testimony. (Rock v. Arkansas, supra, ____ U.S. at p. ___; 107 S.Ct. at p. 2712, fn. 15.)

From this it is clear that contrary to petitioner's allegation that California law prohibits "all post-hypnotic testimony sought to be introduced on a defendant's behalf," California law allows the use of hypnotically refreshed testimony of the accused. More importantly, however, a post-conviction request to order prosecution witnesses to undergo hypnosis could never implicate a defendant's right

to testify at trial. Therefore, petitioner's assertion that this case "exhibits the same problems that were addressed by the Court in Rock" is unfounded.

No rational argument exists for the proposition that the Due Process Clause of the Fourteenth Amendment requires a trial court to facilitate an attempt to generate fodder for a motion for a new trial premised solely on speculation that prosecution witnesses might recant or contradict their trial testimony.

Here, the evidence revealed that on the night of the murder, Robert Parkinson, petitioner's neighbor, was awakened at approximately 3:05 a.m. by noises coming from petitioner's house. (R.T. p. 338.) Mr. Parkinson heard three

voices, two males and one female. A loud violent hostile argument was going on. The female voice appeared to be caucasian. The two male voices appeared to be one caucasian and one black. (R.T. p. 339.) The female appeared to be directing her voice to the caucasian male. The black male also appeared to be directing his voice toward the caucasian male. (R.T. p. 340.) The caucasian male appeared to be directing his voice toward both the female and the black male. This occurred for possibly a minute or two. Mr. Parkinson attempted to go back to sleep. (R.T. p. 342.) Approximately 15 and 20 minutes later, Mr. Parkinson heard the sound of heavy furniture being moved or thrown about. (R.T. p. 342.) The sound Mr. Parkinson heard was something heavy being pushed up against a wall or sliding

door. (R.T. p. 343.) The next distinct sound that Mr. Parkinson heard was a car leaving and going up the street. Within approximately a minute Mr. Parkinson heard the female voice state, "He's been killed." (R.T. pp. 344-345.) The time was approximately 3:40 or 3:45 a.m. (R.T. p. 345.) The voice stating that he had been killed was the same voice that Mr. Parkinson had earlier heard in the argument. (R.T. p. 350.)

Judith Parkinson was also awakened by the loud voices. On prior occasions, she had heard arguments between a male and female voice coming from petitioner's residence. On this occasion she heard two male voices and one female voice. Mrs. Parkinson recognized the female and one of the male voices as the two she had heard in the past. One of

the male voices sounded like that of a caucasian and the other male voice sounded like that of a black person. (R.T. pp. 655, 657, 660.) It was an argumentative situation. (R.T. pp. 653-655.) She also heard a female voice screaming, "He's dead." (R.T. p. 658.)

Petitioner's speculation that the Parkinsons might somehow recant or contradict this testimony because of hypnosis is a rather slim justification for overturning California's standards of admitting hypnotically refreshed testimony. Indeed, this rationale proves too much.

It can be said of almost every prosecution witness in any criminal case that the witness may have forgotten at least some relevant facts favorable to the defendant. However, that reality is

hardly a justification for this Court to consider whether California law restricts the use of hypnotically refreshed testimony in violation of the Constitution.

IV

NO SUBSTANTIAL AND IMPORTANT REASON EXISTS FOR GRANTING REVIEW TO EXAMINE WHETHER SUFFICIENT EVIDENCE SUPPORTS THE JUDGMENT OF CONVICTION

Petitioner contends that this Court should grant her petition for writ of certiorari and review this case because her conviction violates due process of law in that it finds no evidence in the record to support it. Petitioner concedes that the evidence showed that she was present during her husband's brutal killing and had the motive and opportunity to kill her

husband. Nonetheless, she argues that there was no evidence to show she murdered her husband with either a knife or a fireplace poker. Respondent respectfully submits that substantial evidence supports the judgment of conviction.

In order to withstand a challenge to the sufficiency of evidence supporting a conviction, due process of law requires an appellate court, after viewing the evidence in the light most favorable to the prosecution, to determine whether any reasonable trier of fact could have found the necessary elements of the crime beyond a reasonable doubt. (Jackson v. Virginia (1978) 443 U.S. 307, 319.)

Petitioner appears to be contesting the sufficiency of evidence to establish her identity as the murderer

with either the knife or the poker used in the killing. However, by conceding that she had a motive, an affair, to kill her husband and was present during the brutal attack of her husband, petitioner has necessarily conceded two factors under California law that tended to identify her as one of the two people who simultaneously attacked her husband with the fireplace poker and the kitchen knife. (People v. Gonzalez (1948) 87 Cal.App.2d 867, 877 [motive]; People v. Baker (1928) 94 Cal.App. 628, 633 [opportunity].)

In addition to conceding factors that helped establish petitioner's identity as the murderer, there was another factor under California law, her acts of concealment, that also helped identify her as the murderer. (People v. Peete (1921) 54 Cal.App. 333, 346.) One

of the murder weapons, the knife, (Peo. Exh. 17) was discovered in the dishwasher of petitioner's residence. The knife had the blood of the same type of the victim and was found "buttered" among clean utensils. (R.T. pp. 506-509, 551, 553, 778.) Blood splatter analysis revealed that the scene had been altered after the murder. (R.T. p. 691.) There was also evidence that petitioner had washed her hair within 15 minutes of the time of the murder. (R.T. pp. 478-480.) From all of this evidence, it could be reasonably be inferred that petitioner attempted to conceal the circumstances of murder to conceal her own participation therein.

As pointed out by the California Court of Appeal, the evidence was such that it was reasonable to infer that

petitioner and her lover simultaneously attacked petitioner's husband:

> "The jury could reasonably have inferred from the facts that (1) [the victim], although fatally injured numerous times, was alive throughout the brutal attack, and (2) the blows to the head were part of a frenzied attack whereas only four stab wounds were inflicted, that two persons attacked him rather than just one." (Appen. A to Petn. for Writ of Cert. pp. A-19 - A-20.)

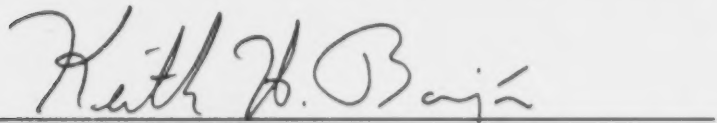
Petitioner has failed to offer any reason why this Court should question these objectively reasonable inferences.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
STEVE WHITE,
Chief Assistant Attorney General
WILLIAM T. HARTER,
Supervising Deputy Attorney General



KEITH H. BORJON,
Deputy Attorney General and
Counsel of Record

Attorneys for Respondent

KHB:dm
LA88US0001
Scrape.KHB